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No. 206

In the Supreme Court of the United States

OCTOBER TERM, 1958

LORENZO WHITE, JOYCE HARPER AND RUBY FIELDS,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported in 254 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1958, and a petition for rehearing was denied on June 25, 1958. The petition for a writ of certiorari was filed on July 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion to suppress evidence seized under a search warrant after the postmaster, acting pursuant to postal regulations, opened fourth-class mail matter and found heroin therein.

2. Whether the trial court committed reversible error in admitting certain evidence obtained from the home of petitioner Ruby Fields at the time of her arrest.

STATUTES INVOLVED

39 U.S.C. 221 provides:

> Mailable matter shall be divided into four classes:
>
> First, written matter;
>
> Second, periodical publications;
>
> Third, miscellaneous printed matter and other mailable matter not in the first, second or fourth classes;
>
> Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class.

39 U.S.C. 475, relating to air parcel-post service, provides in pertinent part:

> The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this section, be determined on the basis of the eight postal zones established for fourth-class matter, * * *.

39 U.S.C. 244 provides:

> The Postmaster General shall make provision by regulation for the indemnification of shippers of articles sent by fourth-class mail or third-class domestic mail, for shipments injured or lost, by insurance or otherwise, and, when desired, for the collection on delivery of the postage and price of the article shipped, fixing such charges as may be necessary to pay the cost of such additional services.

The Postal Manual, Section 162.12, provides in pertinent part:

> You may insure only third- and fourth-class mail or airmail which contains third- or fourth-class matter. * * *

39 U.S.C. 243 provides in pertinent part:

> All matter of the fourth class shall be subject to examination. * * *

39 U.S.C. 250 provides in pertinent part:

> The Postmaster General may prescribe, by regulation, the manner of wrapping and securing for the mails all packages of matter not charged with first-class postage, so that the contents of such packages may be easily examined; * * *.

18 U.S.C. 1716 provides in pertinent part:

> All kinds of poison, and all articles and compositions containing poison * * * are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier.
>
> * * * *

> The transmission in the mails of poisonous drugs and medicines may be limited by the Postmaster General to shipments of such articles from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, cosmetologists, barbers, and veterinarians, under such rules and regulations as he shall prescribe.

* * * *

18 U.S.C. 1717, paragraph (c), provides:

> No person other than a duly authorized employee of the Dead Letter Office, or other person upon a search warrant authorized by law, shall open any letter not addressed to himself.

Rule 41, paragraph (e), F. R. Crim. P., provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained * * *. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioners were convicted in the District Court for Alaska on four counts (1, 2, 3, and 7) charging transportation of narcotics through the mail, receipt and concealment of narcotics, and conspiracy to do so. They were sentenced to imprisonment for five years on each count, the sentences to run concur-

rently (R. 12-14, 18-23).[1] The Court of Appeals affirmed *per curiam*. The issues raised concern the admissibility of evidence allegedly illegally obtained.

1. The major contention relates to the admissibility of the contents of the mailed package upon which the charges of the indictment were based. On this issue, the pertinent evidence may be summarized as follows:

Petitioner White operated a bar in South Fairbanks, Alaska, where petitioners Ruby Fields and Joyce Harper worked as hostesses. Ruby Fields left for the continental United States on December 11, 1955 (R. 41-42).

A former deputy United States marshal testified that he had been investigating petitioners in connection with narcotics since September, 1955. On December 14 of that year, he requested the postmaster at Fairbanks, a Mrs. Boyle, to look for a package which he thought would be coming in and which he had reason to believe contained heroin. He said it would probably be addressed to a fictitious person, would be mailed from some place in the Los Angeles area, and would probably be picked up by a cab driver or somebody that did not know its contents (R. 42-45).

He received a call from Mrs. Boyle a day later that a package which might be the one sought had come in. The package was approximately 18" x 15" x 4", addressed to Myrtle Hicks, General Delivery, Fairbanks, Alaska, and carried a return address of

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[1] Petitioner Ruby Fields was also convicted on count 6 charging the mailing of a poisonous drug and was sentenced to two years on that count to run concurrently with her sentence on the other counts.

Pearline Adams at some place on 60th Street, Los Angeles (R. 46, 73). Neither the postmaster nor the girl at the general delivery window knew anyone by the name of the addressee (R. 72). The package, which weighed more than eight ounces and was insured, was fourth-class mail (R. 75-76, 83-84).[2]

On December 16, the District Operations Manager of the Post Office Department, after ascertaining that the package was fourth-class mail, authorized the postmistress to open it (R. 84). The deputy United States marshal was also present (R. 45).

Mrs. Boyle opened the package and found that it contained a woman's dress. She lifted it up and a small glassine envelope fell to the floor, which the deputy picked up. It contained a white powder, which the deputy tasted and found to be like heroin (R. 46-48). The package was resealed and returned to the General Delivery window (R. 51-52).

On December 17, petitioner White, who lived with Joyce Harper at 721 16th Street in Fairbanks (R. 91-92), asked one Jenkins to pick up from the post office a package addressed to Myrtle Hicks at 731 16th Street (R. 103-105).[3] However, Jenkins was unable

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[2] See 39 U.S.C. 221, 475, *supra*, p. 2.

[3] On December 15, Joyce Harper had asked a taxi driver to pick up some dog food and some mail, and had given him a note with the name of the addressee, Myrtle Hicks, on it. The postmaster told him there was no mail for a person of that name, so he returned with the dog food and the note to Mrs. Harper (R. 91-95).

The next attempt was made the following day, when another cab driver was directed to pick up a pair of stockings and also to pick up a package at the post office for Myrtle

to make the call and another cab driver named Taylor was dispatched (R. 101-102). Taylor asked for and received the package, but was immediately taken upstairs by a deputy United States marshal. Taylor and the officer left together (R. 102-103). They met Jenkins, the driver who had originally received the call (R. 86-87). The officer transferred to Jenkins' cab and they drove, first in search of 731 16th Street, which Jenkins could not find, and then to 721 16th Street. At the deputy's instruction, Jenkins took the package to the door and knocked. The officer could not see what happened at the door, but Jenkins testified that, when petitioner Harper had answered the door, he told her in a low voice that there were officers with him and that she then refused the package. They returned with the package to the post office (R. 88-89, 107-108).

On December 20, a search warrant was obtained for the package (R. 52, 75). It was later sent to the F. B. I. laboratories (R. 49), where the contents of the glassine envelope were found to be heroin (R. 158). Finger prints on the glassine envelope were identified as those of petitioner Fields (R. 172-174, 160-164).

None of the petitioners moved to suppress the evidence before trial. On petitioners' objections to admissibility, the court heard argument out of the

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Hicks, and deliver to 731 16th Street. He did not find that number but found a house that he guessed was the right place, delivered the stockings to a girl he had seen at the Morocco Club, and reported that the package was at the post office but had not been brought up from the back yet (R. 99-101).

presence of the jury after some of the items had been introduced (R. 136, 139-[illegible], 146-147, 151) and then over-ruled objections to the admissibility of the remaining items (R. 155-159).

2. On the dress in the package was a cleaning ticket marked "Fiel" and followed by some numbers (R. 51). When narcotics agents arrested petitioner Fields in Los Angeles, one of the agents told her they were going to search her belongings, to which she said "Go right ahead, everything here is mine" (R. 185-186). The agents found and took a cleaning ticket on a velvet belt on a dress and two tickets marked "Fiel 04749," one in a jewel case on a night stand and one on top of the dresser (R. 187-188, 190-192, 198-199). When these items were offered in evidence, petitioners' counsel objected on the ground that they had been obtained by unlawful search. The objection was overruled (R. 187-193).

Other evidence was introduced by the Government to show that petitioner Fields had mailed the package. As already noted, her fingerprint was found on the glassine envelope.

The supervisor of a cleaning establishment at Fairbanks stated that petitioner Fields was one of their customers, that their shop tickets would be identified by the name of the customer and the number of the ticket which the customer signed, and that the ticket found on the dress contained in the package was one of theirs (R. 200-201).

Ruby Fields, when she took the stand in her own behalf, testified that she was a resident of Fairbanks, Alaska, but had been visiting her family in Los Angeles at the time involved. She stated that she was

an addict of heroin and had mailed the package in question to Fairbanks because she was using the drug quite heavily at that time. She further said that she had sent a message to a friend to have the package picked up and held for her personal use when she returned. She did not want to name the friend, as there were already too many people involved, but it was not anybody present in the court room (R. 219-223, 225, 229).

ARGUMENT

1. The attack on the opening of the package sent through the mails as a violation of the rights of privacy of the petitioners is without merit.

The package in this case was unquestionably fourth-class mail matter. It not only weighed more than eight ounces (see 39 U.S.C. 475, *supra*, p. 2) but, in addition, was insured as fourth-class mail (see 39 U.S.C. 244, *supra*, p. 3). Congress has specifically provided that "All matter of the fourth class shall be subject to examination" (39 U.S.C. 243, *supra*, p. 3), and has authorized the Postmaster General to prescribe the manner of wrapping packages "so that the contents of such packages may be easily examined" (39 U.S.C. 250, *supra*, p. 3). Hence, when the postal authorities opened this fourth-class package, they were acting in accordance with the statute in exercise of their power to determine whether non-mailable matter (heroin) was contained therein. And since the substance found was reasonably believed to be heroin, it was properly subject to seizure under a search warrant after the package had proved to be undeliverable.

Petitioner's reliance on *Ex parte Jackson*, 96 U.S. 727, 733, is misplaced. That case specifically recognized a distinction between different kinds of mail matter, "between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined." While the court was not there dealing with parcel post, the distinction it made as to the classes of mail is equally applicable here since, as noted above, the statute requires that fourth-class mail be open to inspection. One who sends fourth-class mail sends it subject to the statutory provisions, including the right of inspection.

Similarly, petitioner's reliance on *Oliver* v. *United States*, 239 F. 2d 818 (C.A. 8), fails to take into account the difference between first and fourth class mail. It was the Government's argument in the *Oliver* case that, even though the package was sent air-mail at first class rates which did not then distinguish between letters and packages, it was still parcel post (not first class mail) and therefore subject to inspection. It was this argument which the court rejected, holding that air-mail packages, subject to first class rates, were entitled to the benefit of secrecy attached to first class mail. The court noted (239 F. 2d at 823) that: "Provision has, since this Act, been made for air parcel-post service, 62 Stat. 1097, 39 U.S.C.A. § 475, but this was done by separate Act, making the service applicable only to matter exceeding 8 ounces in weight and not affecting

the status as first-class mail of matter not eligible for such service." The implication is plain that the court considered that different rules would apply if the package, as here, exceeded eight ounces and was sent as fourth-class matter.

2. Petitioners also attack the admissibility of cleaning tickets and a belt taken from Ruby Fields at the time of her arrest. Although these were taken from her in the course of a search incident to a valid arrest, it is questionable whether they were subject to seizure since they were not fruits or instrumentalities of the crime. However, despite petitioner's obvious awareness of the seizure before trial, she did not move to suppress the items until they were actually introduced in evidence (R. 188, 199); and since the court merely denied the motions (R. 188, 193, 199) without giving reasons therefor, the motion can properly be treated as untimely.[1] Rule 41(e), F.R. Crim. P.; *Segurola* v. *United States*, 275 U.S. 106, 112; *Rose* v. *United States*, 149 F. 2d 755, 760 (C.A. 9); *Peters* v. *United States*, 97 F. 2d 500, 502 (C.A. 9); *United States* v. *Salli*, 115 F. 2d 292, 293 (C.A. 2); *Sandez* v. *United States*, 239 F. 2d 239, 242 (C.A. 9).

Furthermore, these items were not of any real consequence in the case. Their only purpose was to connect up the "Fiel" ticket (found in the dress in the package) with Ruby Fields to show that she was the sender of the package. There was other evidence offered by the Government to show this very fact (including the identification by the proprietor of the

[1] These items were not covered in the motion to suppress argued during trial (R. 139-145, 146-147, 151).

dry cleaning establishment and the fingerprint of petitioner Fields on the glassine envelope (see the Statement, *supra*, pp. 7, 8)). And, more important, Ruby Fields took the stand and admitted that both the package and its contents were her own, which she said she had mailed from Los Angeles (R. 219-223). In these circumstances, in the language of *Chubb* v. *Upton*, 95 U.S. 665, 669, "It is not necessary, therefore, to inquire whether or not the evidence was properly admitted". See also *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C.A. 8); *Palno* v. *United States*, 58 F. 2d 111, 113 (C.A. 8); and *Bilodeau* v. *United States*, 14 F. 2d 582, 585 (C.A. 9), certiorari denied, 273 U.S. 737.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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